ISSUE CHECKLIST

A. PRETRIAL:

1. Is the information defective?

    a. Does it charge a crime?[1]

    b. Are all elements of the offense listed in the information?[2]

    c. Does the information include all "essential facts," i.e. the victim's name where required?[3]

    d. Is it specific enough to adequately apprise defendant of the allegations he must meet at trial? Was this issue preserved by a request for a Bill of Particulars?[4]

2. Is the offense outside the statute of limitations?[5]

3. Does the court in which it is filed have jurisdiction?[6]

4. Is the statute unconstitutional?

    a. Is it void for vagueness?[7] Would a reasonable person know the charged conduct is proscribed by it? Does it encourage arbitrary

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[1] State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) (setting forth strict vs. liberal standards of review depending on whether challenge is raised before or after verdict).

[2] State v. Courneya, __ Wn. App. __, __ P.3d __ 2006 Wash. App. LEXIS 596 (Slip Op. April 4, 2006) (information failed to allege non-statutory knowledge element for hit-and-run); State v. Johnson, 119 Wn.2d 143, 829 P.2d 1078 (1992) (knowledge of identity of the controlled substance is an element of delivery; information which merely alleged "unlawfully" insufficient); State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004); (information which failed to identify controlled substance with sufficient specificity violated Apprendi's rule that all facts essential to punishment must be pleaded and proven to the jury, but finding that because issue was raised for first time on appeal, reversal not required)

[3] Leach, supra n. 1; State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001) (information did not specify underlying domestic violence crime or identity of victim); but see State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985) (information charging burglary need not allege the specific crime intended)

[4] State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991) (where information lists statutory elements but fails to allege other facts necessary to prepare an adequate defense, defendant must request a bill of particulars to correct the defect, or the issue is waived on appeal)

[5] State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987)

[6] RCW 9A.04.030 (defining criminal jurisdiction); State v. Svenson, 104 Wn.2d 533, 707 P.2d 120 (1985); 132 Wn.2d 333, 937 P.2d 1069 (1997); see also Personal Restraint of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004) (adult court lacked jurisdiction over juvenile once charge was amended to non-automatic decline offense); State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991) (trial court had jurisdiction over shooting on Indian reservation)

[7] Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997); City of Sumner v. Walsh, 148 Wn.2d 490, 61 P.3d 1111 (2003); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005)

or ad hoc enforcement

b. Is the statute overbroad?[8] Does it prohibit by its language activity protected by the First Amendment, regardless of whether the conduct of the defendant is protected?

c. Does it violate Equal Protection by punishing the same conduct under a felony and a misdemeanor provision?[9] Under different classes of felony?[10] Under different SRA seriousness levels?

d. Does it violate Equal Protection by making an irrational classification,[11] such as punishing possession of marijuana as severely as possession of heroin?

e. Does it violate due process?[12] Did the defendant have reasonable notice that the statute applied?

f. Does it punish exercise of a constitutionally protected right,[13] such as freedom of religion, right to abortion, privilege against self-incrimination?

g. Is there a presumption in the statute that does not follow beyond a reasonable doubt from the established fact,[14] such as the presumption that a kidnapping beyond a specific time period is presumed to be interstate?

h. Does the statute violate the Eighth Amendment prohibition against cruel and unusual punishment by allowing punishment grossly disproportionate to the offense?[15]

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[8] Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004); State .v Williams, 144 Wn.2d 197, 26 P.3d 890 (2001)

[9] United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); City of Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d 1371 (1991)

[10] State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984); State v. Long, 98 Wn. App. 669, 99 P.2d 102 (2000)

[11] State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992); State v. Ruff, 122 Wn.2d 371, 861 P.2d 1063 (1993)

[12] Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990); State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001); see also, discussion of due process vagueness doctrine, supra n. 7.

[13] City of Spokane v. Marr, 129 Wn. App. 890, 120 P.3d 652 (2005); Seattle v. Larkin, 10 Wn. App. 105, 516 P.2d 1083 (1973)

[14] State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996)

[15] Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); State v. Franklin, 56 Wn. App. 915, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990)

i. Did the manner of passage of the statute (or initiative) violate the State Constitution? (i.e. single subject rule).[16]

j. Does the statute violate defendant's right to bear arms (gun violence cases)?[17]

k. Whether you can draw an adverse inference from a constitutionally granted right?[18]

5. Should severance have been granted?

a. Was the defendant improperly tried with co-defendants?[19]

b. Was the defendant improperly tried on unrelated charges?[20]

c. Was this issue waived because defense counsel failed to raise the motion at the close of the state's case?[21]

d. On severance issues, does Crawford overrule Bruton?

6. Did defendant get a speedy trial?

a. Was court rule CrR 3.3 complied with?[22] Was the defendant timely arraigned?[23] Timely tried?[24] Proper objections made, in i.e., timely and specific?[25]

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[16] Const. art. II, § 19

[17] City of Seattle v. Mont, 129 Wn.2d 583, 919 P.2d 1218 (1996); State .v Spiers, 119 Wn. App. 85, 79 P.3d 30 (2003) (statute infringed on right to bear arms by criminalizing firearm ownership for persons merely charged with a "serious offense," regardless of whether they relinquished possession)

[18] State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (gun possession)

[19] State v. Dent, 132 Wn.2d 467, 869 P.2d 392 (1994)

[20] CrR 4.4(b); State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989); State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984)

[21] State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990) (pertaining to defendant's obligation to make severance motion before trial)

[22] State v. Nguyen, __ Wn. App. __, 129 P.3d 821 (2006) (defendant's speedy trial right violated and abuse of discretion found where court granted state's motion to continue trial over defendant's objection to "track" with another, unrelated case)

[23] State v. Huffmeyer, 102 Wn. App. 121, 5 P.3d 1289 (2000) (state failed to bring defendant who was serving sentence in another county for arraignment; serving warrant on other jail contemporaneously with filing of information insufficient to satisfy due diligence requirement because county personnel did not notify defendant of pending charges)

[24] See Nguyen, supra n. 22.

[25] State v. Frankenfield, 112 Wn. App. 472, 49 P.3d 921 (2002) (defendant's objection to date of arraignment insufficient to alert court to speedy trial issue; speedy trial violation deemed waived); State v. Parker, 99 Wn. App 639, 994 P.2d 294 (despite unnecessary delay between filing of information and

b. Was there a constitutional speedy trial violation independent of whether the court rule was violated?[26]

c. Did the state delay until a juvenile was over 18 and subject to prosecution as an adult?[27]

d. Did preaccusatorial delay prejudice the defendant in some other way?[28]

e. Does the new speedy trial rule violate a defendant's right to speedy trial?

7. Was defendant competent to be tried?[29]

a. Did he understand the nature of the proceeding?

b. Could he assist his counsel?

c. Does the federal standard (Cooper)[30] raise the standard of competency, i.e. a) does defendant understand whether or not s/he should testify; b) can defendant make decisions regarding his/her representation; c) Was competency forced with medication?

8. Was a motion for change of venue improperly denied?[31]

a. Was there extensive pre-trial publicity?[32]

b. Is defendant notorious in the area?

9. Did the defendant waive rights to jury or to counsel?

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arraignment, defendant waived issue by failing to raise it at the arraignment hearing); rev. denied, 142 Wn.2d 1002 (2000)

[26] Const. art. I, §§ 10; 22; State v. Hoffman, 150 Wn.2d 536, 78 P.3d 1289 (2003) (adult and juvenile speedy trial rules designed to protect constitutional right to speedy trial)

[27] State v. Norby, 122 Wn.2d 258, 858 P.2d 210 (1993) (setting forth three-part test for determining whether preaccusatorial delay requires dismissal)

[28] Norby, supra n. 27.

[29] RCW 10.77.050; Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1974); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 84 (1960); Personal Restraint of Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)

[30] Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

[31] State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993)

[32] State v. Crudup, 11 Wn. App. 583, 524 P.2d 479, rev. denied, 84 Wn.2d 1012 (1974)

a. Does the record show a knowing, voluntary and intelligent waiver of jury in bench trial?[33]

b. If the defendant appeared pro se, is there a knowing, voluntary and intelligent waiver of right to counsel?[34]

c. Was the defendant prevented from exercising his right to appear pro se?[35]

d. In stipulated facts trial, are the stipulated facts actually included in the record?[36]

10. Was the jury properly picked?

a. Did the jury venire adequately reflect area's population by race, sex, age, social class?[37] Does the mechanism for selecting venire cause disproportionate representation of these groups?[38]

b. Was voir dire improperly restricted, especially as to subjects directly pertinent to the case, as attitudes towards race, drugs, hand guns, etc. ?[39]

c. Were reasonable defense requests to strike jurors for cause denied?[40]

d. Were unwarranted State requests to dismiss for cause granted?[41]

e. Did the state use peremptory challenges to exclude jurors based on race, sex?[42]

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[33] CrR 6.1(a); Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984)
[34] State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991)
[35] State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002)
[36] See, e.g., State v. Fitzpatrick, 5 Wn. App. 661, 491 P.2d 262 (1971) (stipulated facts and trial court's findings failed to support conviction for possession with intent to sell and instead supported defendant's explanation)
[37] Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)
[38] Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); see also, Miller-El v. Dretke, infra n. 41 (prosecutor's "shuffling" of jury panel)
[39] State v. Fredriksen, 40 Wn. App. 749, 700 P.2d 369, rev. denied, 104 Wn.2d 1013 (1985)
[40] State v. Witherspoon, 82 Wn. App. 634, 919 P.2d 99 (1996), rev. denied, 130 Wn.2d 1022 (1997)
[41] Brown v. Lambert, 431 F.3d 661 (9th Cir. 2005) (court improperly granted state's cause challenge to juror who said he was willing to consider death penalty if instructed to do so); Miller-El v. Dretke, __ U.S. __, 125 S..Ct. 2317, 162 L.Ed.2d 196 (2005)
[42] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1985); Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)

11. Were defense motions to suppress evidence improperly denied? (See also Improper Admission of Evidence, below.)

    a. Was the search and seizure with a warrant improper?

        1. Does the affidavit satisfy probable cause? Were the informant and the information both reliable?[43] Is the informant named?[44] Does he have a demonstrable track record in giving information?[45] Do the facts recited give probable cause?[46] Is the information recent and based upon personal observation?[47]

        2. Is the warrant sufficiently specific? Did the search exceed the scope of the warrant?[48]

    b. Was the warrantless search and seizure improper? Does it fall within a recognized exception to the warrant requirement?

        1. Was the item seized in the officer's plain view? Did the officer have lawful authority to be in the place where he saw the item?[49] Was discovery inadvertent?[50] Did the officer immediately recognize the item as incriminating evidence or was he guessing?[51]

        2. Was the search incident to a lawful arrest? Is it limited only to areas the arrestee could reasonably reach for weapons or to destroy evidence?[52]

        3. Did defendant (or another so authorized) consent to a search?[53] Was it coerced, or automatic deference to

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[43] State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984) (requiring Aguilar-Spinelli standard under Washington Constitution);
[44] State v. Ibarra, 61 Wn. App. 695, 812 P.2d 114 (1991) (anonymous informant; insufficient evidence to support basis for knowledge and veracity prongs)
[45] Jackson, supra n. 43.
[46] Thein, infra n. 48 (no PC established based on generalizations about common habits of drug dealers)
[47] State v. Bohannon, 62 Wn. App. 462, 814 P.2d 694 (1991)
[48] State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999); State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992); State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002)
[49] State v. Kull, 155 Wn.2d 80, 118 P.3d 307 (2005); State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984) (Chrisman II)
[50] State v. McAlpin, 36 Wn. App. 707, 677 P.2d 185, 102 Wn.2d 1011 (1984)
[51] Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)
[52] Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); State v. Fore, 56 Wn. App. 339, 783 P.3d 626 (1989), review denied, 114 Wn.2d 1011 (1990)
[53] State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005)

authority?[54]

4. Was the search from a movable car?[55] Was the stop of the car unjustified? Was it merely a traffic violation? Was the car effectively non-mobile when the search was carried out? Was the defendant already removed from vehicle? Was item in trunk or other closed or locked container?[56]

5. Was the search a lawful stop-and-frisk? Did the officer have a reasonable suspicion the person was armed?[57]

6. Were the officers in legitimate "hot pursuit"?[58]

7. Were the circumstances otherwise exigent, e.g., did the officers fear that destruction of the evidence was imminent?[59]

c. Was the warrantless arrest proper?

1. Was the offense a misdemeanor not committed in the officer's presence (except domestic violence)?[60]

2. Was the warrantless arrest in a private home excused by exigent circumstances?[61]

3. Was the warrantless arrest in a public place based on probable cause that a crime had been committed and that the defendant committed it?[62]

d. Was the stop and seizure of the defendant improper?

1. Where the defendant was not free to go, was he in effect under arrest?[63]

2. Was an investigative stop based on a well-founded suspicion of the officer based on specific, articulable

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[54] State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998)
[55] New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)
[56] State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)
[57] State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993)
[58] State v. Counts, 99 Wn.2d 54, 659 P.2d 1087 (1983)
[59] Chimel, supra n. 52;
[60] State v. Hornaday, 105 Wn.2d 120, 713 P.2d 71 (1986)
[61] Counts, supra n. 58; Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)
[62] RCW 10.31.100
[63] Cf., State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992)

facts?[64] Did the scope of the stop exceed the limited scope of a lawful investigative stop? If frisk was a self-protective search for weapons, did circumstances support reasonable inferences that person searched was armed and dangerous?[65]

e. Were defendant's statements to the police inadmissible?

1. Did the trial court fail to hold a CrR 3.5 hearing?[66]

2. Were the statements "poisonous fruit" of an improper arrest or stop?

3. Was there a per se violation of Miranda? Were the Miranda rights recited?

4. Did defendant knowingly, voluntarily and intelligently waive those rights? Were threats or promises, direct or implied, made?[67] Did the police lie to trick the defendant? Consider the defendant's age, intelligence, language, lack of experience with police, as well as the frightening, disorienting, and intimidating aspects involved in the arrest and detention.

5. Assuming a valid waiver, was the statement nonetheless involuntary?[68]

6. Was defendant's right to counsel prior to making a statement violated? Did he request an attorney? Was one provided prior to making the statement?[69] Did the police resume questioning of the defendant after the request for any reason?[70]

7. Was defendant's invocation of his right to remain silent or to counsel used against him at trial? Mentioned by witness

[64] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)
[65] See Galbert supra n. 57
[66] State v. Williams, 137 Wn.2d 746, 975 P.2d 963 (1999)
[67] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)
[68] Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) (police tactics in telling suspect who repeatedly asked for counsel that his lawyer did not want to see him rendered statement involuntary)
[69] CrR 3.1; State v. Templeton, 148 Wn.2d 193, 207, 59 P.3d 632 (2002)
[70] Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct 1880, 68 L.Ed.2d 378 (1981); State v. Robtoy, 98 Wn.2d 30, 37, 653 P.2d 284 (1982)

or prosecutor?[71]

f. Were prior identifications of the defendant improperly admitted?

1. Was counsel present at a post-information line-up?

2. Was the line-up unduly suggestive?[72]

3. Was the witness shown a photo montage after the defendant was in custody?

4. Was the photo montage unduly suggestive?[73]

5. Were in-court identifications fatally tainted by improper pre-trial identification?[74] Was the defendant presented as a suspect in more than one identification procedure?[75] Are indicia of reliability, such as reasonable opportunity to observe and remember, lacking?[76]

B. TRIAL:

1. Admission of evidence.

NOTE that the Washington Rules of Evidence are in most instances substantially identical to the Federal Rules of Evidence. Where there are parallel provisions, Federal cases construing the FRE should be cited as authority to the analogous Washington rule.

a. Was irrelevant evidence admitted or relevant defense evidence excluded?[77] Was this prejudicial?

b. Was hearsay admitted (not within any exception)?[78] If purportedly a business record, was the Washington statute on

[71] Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Easter, 130 Wn.2d 228, 239, 922 P.2d 1285 (1996)
[72] Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1967).
[73] State v. Boot, 40 Wn. App. 215, 697 P.2d 1034 (1985)
[74] Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).
[75] Foster, supra n. 72.
[76] Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).
[77] Davis v. Alaska, 415 U.S. 308, 948 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (reversing where defendant was prevented from exposing facts from which inferences could be drawn about a witness's credibility); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996)
[78] See e.g. State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992) (reversing where opinion of non-testifying fingerprint expert did not meet business record exception); but see, State v. Monson, 53 Wn. App. 854, 771 P.2d 359 (1989) (certified copy of driving record admissible as business record); State v. Quincy, 122 Wn. App. 395, 95 P.3d 353 (2004) (computer-generated loss sheet admissible to show value of stolen items in first-degree theft prosecution)

business records violated?[79]

c. Was the defendant's right to fully confront his accusers violated?
   1. Was *Crawford* violated by the admission of testimonial hearsay (even if it fit within a hearsay exception)?[80]

d. Was a proper foundation and chain of custody shown for physical evidence?[81]

e. Were the witnesses competent to testify?[82] Too young,[83] too senile, too crazy,[84] too retarded?

f. Was the Best Evidence Rule satisfied for documentary evidence?[85]

g. Were expert witnesses properly qualified?[86] Did lay witnesses improperly give opinions?[87]

h. Were prior bad acts of the defendant or his witnesses improperly admitted?[88] Are they so unique and so similar to the present crime as to constitute evidence of a distinctive modus operandi[89] or common plan?[90] Are they necessary to show intent[91] or identity?[92] Did the court balance probative value vs. prejudice on the record?[93]

i. Were prior convictions of the defendant or his witnesses improperly admitted? Were misdemeanors other than perjury,

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[79] RCW 5.45.020
[80] Crawford v. Washington, 540 U.S. 964, 157 L.Ed.2d 309, 124 S.Ct. 460 (2004); State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006) (considering constitutionality of child hearsay statute); State v. Davis, 154 Wn.2d 291, 111 P.3d 844; (admissibility of non-testifying complainant's 911 call) cert. granted, Davis v. Washington, 126 S.Ct. 547 (2005)
[81] State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002)
[82] RCW 5.60.020; RCW 5.60.050
[83] In re Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 857 (1998); State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967)
[84] State v. Pethoud, 53 Wn.2d 276, 332 P.2d 1092 (1958)
[85] ER 1002; Rhyne v. Bates, 35 Wn. App. 529, 667 P.2d 1131 (1983)
[86] ER 702; Seattle v. Personeus, 63 Wn. App. 461, 819 P.2d 821 (1991) (admissible: testimony about alcohol "burn-off" rate)
[87] State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999) (inadmissible: state trooper's lay opinion about driver's state of mind)
[88] ER 404(b)
[89] State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002)
[90] State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003)
[91] State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995); State v. Wade, 98 Wn. App. 328, 337-38, 989 P.2d 576 (1998)
[92] Thang, supra n. 89
[93] State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001)

larceny by false statement, or other crimen falsi admitted?[94] Were felony convictions more than ten years old admitted without advance notice to the defendant and without a special finding of probative value substantially outweighing the prejudicial impact?[95] Was an express balancing by the judge of probative value and prejudicial impact done on the record?[96] If the prior conviction was by a guilty plea, did the state prove it as constitutionally valid, i.e., that the defendant was apprised of the rights waived by a guilty pleas, the elements of the offense, the possible sentence, and that he provided the court with sufficient facts to support a guilty finding?

j. Was there a timely and specific objection to the evidentiary rulings?[97]

k. Were Washington statues regarding child hearsay and competency followed? [98] Were there pre-trial hearings to determine the admissibility of child hearsay?

2. Prosecutorial Misconduct

a. Was the prosecutor's argument improper? Did it misstate the facts or the law? Was it inflammatory?[99] Did it refer to matters not proven or to evidence which was ruled inadmissible?[100] Did it comment on the failure of the defendant to testify?[101] Exercise of Miranda rights?[102] Did the prosecutor indicate a personal belief in the defendant's guilt or in the credibility of a witness?[103]

b. Did the prosecutor withhold favorable evidence?[104] Did the state fail to preserve evidence which could be favorable to the

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[94] ER 609(a)(2)
[95] State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997); State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)
[96] State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996); State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), rev. denied, 125 Wn.2d 1021 (1995)
[97] ER 103(a)(1);
[98] See generally, n. 83
[99] State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993)
[100] State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993); State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984)
[101] United States v. Hardy, 37 F.3d 753 (1st Cir. 1994)
[102] State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)
[103] State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (19920
[104] Brady v. Maryland, 373 U.S 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Kyles v. Whitley, 514 U.S. 519, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)

defendant?[105]

c. Were the questions of the prosecutor improper? Did they suggest impermissible and prejudicial inferences?[106] Did the prosecutor persist in asking questions of a type already held by the trial judge to be impermissible?[107]

3. Ineffective assistance by the defense counsel.

a. Did the defense attorney perform competently?[108]

b. Did the defense attorney have a conflict of interest? Was he/she or someone else in firm representing a co-defendant?[109] A witness?[110]

4. Improper actions by judge.

a. Did the judge comment on the evidence?[111] Could the jury have inferred from the judge's remarks or facial expression (on the record) his opinions as to the evidence?[112] Could the judge's choice of words, however unintentionally, constitute an impermissible comment on the evidence? By questioning witnesses, did the judge act as an advocate? Did the court's instructions contain a comment on the evidence?[113]

b. Were the judge's instructions to the jury adequate?

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[105] State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994)
[106] State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004); State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997)
[107] Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) (where prosecutor engages in misconduct with the intent of inducing defendant to move for a mistrial, subsequent prosecution is barred by double jeopardy); State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210 (2004)
[108] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984); In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) (failure to investigate mental defense); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) (failure to propose voluntary intoxication instruction); State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003) (failure to present diminished capacity defense); Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) (failure to investigate); State v. Shaver, 116 Wn. App. 375, 65 P.3d 388 (2003) (failure to move to exclude prior conviction evidence); State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) (failure to pursue lesser-included offenses); State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993) (failure to research consequences of guilty plea); State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004) (failure to argue same course of criminal conduct at sentencing)
[109] State v. James, 48 Wn. App. 353, 739 P.2d 1161 (1987)
[110] In re Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983)
[111] Const. art IV, § 16; State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995)
[112] State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990)
[113] State v. Eaker, 113 Wn. App. 111, 53 P.3d 37 (2002), rev. denied, 149 Wn.2d 1003 (2003) (reversing for comment on evidence because instruction resolved disputed issue of fact that should have been left to the jury)

1. Did any instructions misstate the law?[114] Were they unduly confusing?[115] Could a reasonable juror have interpreted them incorrectly?[116]

2. Did the "to convict" instruction include all the essential elements?[117]

3. Did the "to convict" instruction include an uncharged alternative means?[118]

4. Were proper defense instructions refused?[119] Exceptions taken? Ineffective assistance of counsel not to except or propose proper instructions?

5. Was there an instruction on the presumption of innocence?[120]

6. Was there an instruction requiring proof beyond a reasonable doubt of all of the elements of the offense?

7. Was there an instruction requiring proof beyond a reasonable doubt for firearm and deadly weapon special verdicts?[121]

8. Was there an instruction requiring the state to prove beyond a reasonable doubt absence of self-defense,[122] good faith claim of title,[123] accident, or parental discipline?[124]

9. Was every element of the offense defined if the elements are technical terms of art?

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[114] State v. DeRyke, 149 Wn.2d 906, 73 P.2d 1000 (2000); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)
[115] State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2004)
[116] State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002)
[117] Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); see also, State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (law of the case doctrine)
[118] State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004) (erroneous instruction on accomplice liability; held harmless)
[119] State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) (refusal to give defense-proposed "no duty to retreat" instruction); State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983) (refusal to give defense-proposed diminished capacity instruction)
[120] State v. McHenry, 88 Wn.2d 211, 558 P.2d 188 (1977)
[121] State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980)
[122] State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984); State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997)
[123] State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984)
[124] RCW 9A.16.100; State v. Singleton, 41 Wn. App. 721, 705 P.2d 825 (1985)

10. Are terms of art like "lawful force" or "unlawful entry" explicitly defined?[125]

11. If the defendant did not testify, was the jury instructed that they may not draw unfavorable inferences from that fact?

12. If the defendant testified and was impeached by prior convictions, was the jury instructed that they may consider those convictions only with respect to credibility?[126] Were other limiting instructions given as needed?

13. Was the jury instructed that the verdict must be unanimous?[127] That the jury must be unanimous as to mode of commission of the offense where there are two or more inconsistent ways of violating the law? (That they must unanimously agree whether the defendant was an accomplice or a principal?) That they must agree what specific underlying act, if there were more than one, constituted the crime?

14. Were lesser included offenses instructed upon when the elements of lesser offenses are included within the elements of the greater offense and the evidence supports an inference that the lesser was committed?[128]

15. In offenses requiring knowledge, was the jury instructed that the defendant must have actual knowledge that he is breaking the law, not merely information from which he ought to have known he was breaking the law?[129]

16. Did the accomplice instruction improperly allow conviction if defendant intended to facilitate "a crime" (rather than "the crime")?[130]

17. Did the accomplice instruction allow conviction even without proof of an overt act?

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[125] State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998)
[126] See Rivers, supra n. 96.
[127] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984); State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)
[128] State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000)
[129] State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000)
[130] State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)

5. Errors in Jury Deliberation.[131]

   a. Was there improper communication with the jury?

      1. Did a juror receive information concerning the case outside the courtroom? From a witness,[132] the bailiff, the media?[133]

      2. Was there improper evidence before the jury to imply that the defendant has prior convictions or is exceptionally dangerous?[134] Was he seen in jail clothing or in handcuffs?[135] Were aliases before the jury? Was he referred to in testimony as a parolee or probationer? Booking photos used?[136]

   b. Was there misconduct by the jury?

      1. Was a juror related to the parties? Otherwise biased?[137]

      2. Did any juror make improper and prejudicial remarks about the defendant or the case?

      3. Did any juror do research, conduct experiments, or view evidence not admitted in court?[138]

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[131] State v. Cuzick, 11 Wn. App. 539, 524 P.2d 457 (1974) (reversing where alternate juror was allowed to remain in jury room during deliberations)

[132] State v. Monroe, 107 Wn. App. 637, 27 P.3d 1249 (2001) (court improperly permitted jury to receive transcript of one witness's testimony, which unduly emphasized the importance of that witness)

[133] State v. Johnson, 125 Wn. App. 443, 105 P.3d 85 (2005) (improper ex parte contacts between bailiff and jury)

[134] State v. Booth, 36 Wn. App. 66, 671 P.2d 1218 (1983) (bailiff told juror defendant skipped bail); State v. Ratliff, 121 Wn. App. 642, 90 P.3d 79 (2004) (judge responded to jury questions that defendant was in custody before line-up and that defendant was arrested out of state, from which jury could infer he fled); State v. Freeburg, 105 Wn. App. 492, 20 P.3d 384 (2001) (erroneous admission of evidence of gun possession at time of arrest)

[135] Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); State v. Damon, 144 Wn.2d 686, 25 P.3d 418 (2001); State v. Flieger, 91 Wn. App. 236, 955 P.2d 878 (1998)

[136] State v. Sanford, 128 Wn. App. 280, 115 P.3d 368 (2005) (error in admission of officer testimony that he viewed booking photo because identity was not an issue and it created an inference of past criminal conduct)

[137] Sanders v. Lamarque, 357 F.3d 943 (9th Cir. 2004) (juror lied during voir dire); State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) (juror admitted bias in favor of police officers); State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001) (juror was retired police officer; possibility that implied bias was conveyed by juror's desire to sit on the jury)

[138] State v. Gobin, 73 Wn.2d 206, 437 P.2d 389 (1968); Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973) (standard of review); State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989) (in deliberations, juror discussed personal experience with impediment control); United States v. Edwards, 303 F.3d 606 (5th Cir. 2002) (use of dictionary and thesaurus by juror; juror otherwise biased)

c. Was the jury coerced into a verdict?

1. Was an instruction given pressuring hold-outs?[139]

2. Was the jury forced to deliberate after they were deadlocked?[140]

d. Did the court properly respond to a jury inquiry?

1. Notice to parties and counsel?[141]

2. Additional instruction in writing?

6. Bench trials
   a. Did the trial court enter findings and conclusions?[142]
      1. Insufficient findings – no finding on essential element.[143]

C. JUVENILE CASES

1. Decline determination violates *Blakely*.[144]
2. Lack of jury trial violates *Blakely*.[145]

D. VERDICT:

1. Is there sufficient evidence upon which to sustain the verdict?[146] Could a rational trier of fact find all of the elements of the offense beyond a reasonable doubt?[147] Including any additional elements in the "to convict"

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[139] CrR 6.15(f)(2); State v. Boogard, 90 Wn.2d 733, 585 P.2d 789 (1978) (jurors coerced into verdict when judge polled to see if a verdict could be reached in ½ hour); see also State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005) (court improperly dismissed holdout juror based on suspicion of nullification without applying heightened evidentiary standard to inquiry into whether juror's views were based on the sufficiency of the evidence); Johnson, supra n. 131.

[140] Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); State v. Jones, 97 Wn.2d 159, 641 P.2d 708 (1982) (court's failure to determine if jury was hopelessly deadlocked resulted in premature dismissal of jury; retrial barred by double jeopardy)

[141] State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) (replaying tapes for jury in absence of counsel; held harmless because third party present)

[142] CrR 6.1(d); State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998) (failure to enter written findings may be prejudicial if defendant can show delayed written findings were "tailored" to meet issues raised on appeal)

[143] See Fitzpatrick, supra n. 36

[144] State v. H.O., 119 Wn. App. 549, 81 P.3d 883 (2003), rev. denied, 152 Wn.2d 1019 (2004)

[145] State v. Tai N., 127 Wn. App. 733, 113 P.3d 19 (2005), rev. denied, 2006 Wash. LEXIS 203 (2006)

[146] State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)

[147] In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)

instruction which became the "law of the case?"[148]

2. If the defendant is convicted as an accomplice, does the evidence show an overt act by the defendant plus intent to further the crime?

3. Was the defendant punished twice for the same offense?[149] Was the defendant convicted of both a greater and a lesser included offense? (Was the defendant convicted of both crime requiring use of a deadly weapon and the firearm special allegation?) Was the defendant convicted of a crime which was incidental to the commission of another offense, such as kidnapping incidental to rape, or assault incidental to robbery?[150] Do these crimes merge?

4. Are there legally inconsistent verdicts?[151]

E. SENTENCING:

1. Plea Agreements
    a. Is the plea valid?[152] Was the defendant informed of all the elements of the crime, standard range, period of supervision, etc.?[153]
    b. Did the prosecutor breach the plea agreement?[154]
    c. What issues survive the standard range?[155]
    d. Is the guilty plea involuntary?[156]

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[148] Hickman, supra n. 117

[149] United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)

[150] State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)

[151] State v. Goins, 151 Wn.2d 728, 92 P.3d 181 (2004) (inconsistency between general and special verdicts; issue waived because not objected to below)

[152] In re West, 154 Wn.2d 204, 110 P.3d 1122 (2005) (agreement to no good time invalid); State v. Gronnert, 122 Wn. App. 214, 93 P.3d 200 (2004) (plea bargain requiring defendant to stipulate to exceptional sentence in the event he tested positive for controlled substances while on conditional release contrary to interests of justice and purposes of SRA)

[153] Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) (misinformation about direct consequence of guilty plea entitled defendant to choice of remedies)

[154] In re Palodichuk, 22 Wn. App. 107, 589 P.2d 269 (1978) (breach of plea); State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998); State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997); Personal Restraint of Lord, 152 Wn.2d 182, 94 P.3d 952 (2004) (prosecutor breached plea bargain by failing to recommend SSOSA)

[155] State v. McNeair, 88 Wn. App. 331, 944 P.2d 1099 (1997) (defendant sentenced to standard range may appeal constitutionality of sentencing provision because it is not simply a challenge to the length of the sentence but to the Legislature's power to structure sentences in a particular way); State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997) (review of denial of request for exceptional sentence downward is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range)

[156] Isadore, supra n. 153; State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) (guilty plea involuntary based on failure to advise about mandatory community placement); State v. Adams, 119 Wn. App. 373, 82 P.3d 1195 (2003) (guilty plea involuntary based on inaccurate advice regarding availability of SSOSA)

2. If not felony, was the sentence within the statutory limits?[157]

3. Was the felony sentence within the standard range?

    a. Was standard range properly calculated?[158]

    b. Were there multiple counts of the same criminal conduct?[159]

    c. Was there adequate proof of prior convictions?[160] Certified copies of judgments and sentences?[161] Pleas constitutional on face (i.e., presence of counsel). Served concurrently or same criminal conduct?[162]

    d. Were juvenile prior convictions committed after defendant turned 15?[163]

    e. Did state prove out-of-state felonies were comparable to Washington offenses?[164]

4. Was the correct term of community placement/custody imposed?[165]

5. Enhancements – jury instructed on DWE but Firearm Enhancement imposed by judge?[166]

6. Was an exceptional sentence imposed in violation of *Blakely*?[167]

    a. Point added to offender score for being on community placement at the time of the offense?[168]

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[157] RCW 9.94A.599; State v. Sloan, 121 Wn. App. 220; 87 P.3d 1214 (2004) (remanding for clarification that community placement could not exceed statutory maximum)
[158] In re Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (inclusion of "washed out" prior convictions); State v. Weber, 127 Wn. App. 879, 112 P.3d 1287 (2005), rev. granted, 2006 Wash LEXIS 135 (2006) (whether juvenile adjudications can be included in the offender score without violating Apprendi/Blakely)
[159] State v. Garza-Villareal, 123 Wn.2d 42; 864 P.2d 1378 (1993) (possession with intent to deliver cocaine and heroin same criminal conduct); State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) (separate, back-to-back drug deliveries same criminal conduct where intent remained the same)
[160] State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)
[161] State v. Rivers, 130 Wn. App. 689; 128 P.3d 608 (2005) (failure to provide certified copy of judgment and sentence)
[162] Personal Restraint of Sietz, 124 Wn.2d 645, 880 P.2d 34 (1994); State v. Bolar, 129 Wn.2d 361, 917 P.2d 125 (1996)
[163] Personal Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004)
[164] Ford, supra n. 158; Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005); Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)
[165] Isadore supra n. 153
[166] Recuenco v. Washington, 154 Wn.2d 156; 110 P.3d 188, cert. granted, 2005 U.S. LEXIS 7658 (2005)
[167] State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)
[168] State v. Jones, 126 Wn. App. 136; 107 P.3d 755, rev. granted, 2005 Wash. LEXIS 908 (2005)

7. Challenges to exceptional sentences imposed after "*Blakely* fix" legislation.
    a. Factors inherent in crime[169]
    b. Vagueness/overbreadth[170]

8. Is exceptional sentence clearly excessive? (abuse of discretion)[171]

    a. Compare what crimes and offender scores would give such a standard range as this sentence would fall in.
    b. Amount of time "out of thin air"?
    c. Court's effort to get around good-time early release?

[169] State v. Ferguson, 142 Wn.2d 631, 15 P.3d 1271 (2001)
[170] See generally, n. 15, supra
[171] State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991) but see State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1208 (1995)